

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

CHAD BOURNE,

Case No. 3:22-cv-00521-MMD-CSD

Plaintiffs,

ORDER

v.

ROOKIES INC.,

Defendant.

I. SUMMARY

This is an employment discrimination action brought by Plaintiff Chad Bourne against his former employer Rookies Inc., doing business as Rookie's Sports Bar and Grill. (ECF No. 1 ("Complaint").) Before the Court is Defendant's motion to dismiss (ECF No. 13).¹ As further explained below, because Plaintiff's disability discrimination and retaliation claims are time-barred, and the Court declines to exercise supplemental jurisdiction over Plaintiff's state tort claim, the Court will grant in part and deny in part Defendant's motion to dismiss.

II. BACKGROUND

The following allegations are adapted from the Complaint. Plaintiff began his employment with Defendant as a bartender in August 2019. (ECF No. 1 at 3.) Defendant was aware that Plaintiff was diagnosed with ADHD due to a traumatic brain injury and suffered from occasional seizures. (*Id.*) On or about December 30, 2019, while working at Rookie's, Plaintiff had a seizure, lost consciousness, hit his head, and knocked out his teeth. (*Id.*) Thereafter, Plaintiff was removed from the work schedule, and he complained to his Rookie's supervisor that "he felt he was being discriminated against based on his

¹Plaintiff responded (ECF No. 14), and Defendant replied (ECF No. 17).

1 disability since Rookie's was not allowing him to return to work." (*Id.*) On or about January
2 20, 2020, Defendant terminated Plaintiff's employment. (*Id.*)

3 On or about May 9, 2020, Plaintiff filed his charge of discrimination with the Equal
4 Employment Opportunity Commission ("EEOC"). (*Id.* at 2.) On August 26, 2022, the
5 EEOC issued Plaintiff a right to sue letter. (*Id.*; ECF No. 6 at 2.) On November 25, 2022,
6 Plaintiff's counsel attempted to file the Complaint, but it was not properly uploaded. (ECF
7 No. 1 at 3.) On December 13, 2022, Plaintiff properly filed the Complaint on the docket.
8 (ECF No. 1 (indicating file date of December 13, 2022).)

9 Plaintiff asserts three claims for relief: (1) disability discrimination and harassment
10 under 42 U.S.C. § 12101 *et seq.*, the Americans with Disabilities Act ("ADA"), and Nevada
11 Revised Statutes ("NRS") § 613.330; (2) retaliation under the ADA, 42 U.S.C. § 12203,
12 and NRS § 613.340; and (3) negligent hiring, training, and supervision. (*Id.* at 4-6.)

13 **III. DISCUSSION**

14 Defendant moves to dismiss all three of Plaintiff's claims. The Court addresses
15 Defendant's motion as to each challenged claim.

16 **A. Disability Discrimination and Retaliation Claims**

17 Defendant argues that Plaintiff's disability discrimination and retaliation claims
18 must be dismissed because they are untimely. (ECF No. 13 at 4.) Under the ADA and
19 Nevada law, a plaintiff must file a disability discrimination lawsuit within ninety days after
20 receiving a notice of right to sue from the EEOC. See 42 U.S.C. § 2000e-5(f)(1) (setting
21 90-day period in which Title VII complainant may bring a civil action); *Payan v. Aramark*
22 *Mgmt. Servs. Ltd. P'ship*, 495 F.3d 1119, 1121-22 (9th Cir. 2007) (stating that the 90-day
23 period operates as a limitations period, and if a litigant does not file suit within 90 days of
24 receipt of the notice of right to sue, the action is time-barred); *Stiefel v. Bechtel Corp.*, 624
25 F.3d 1240, 1243-44 (9th Cir. 2010) (citing 42 U.S.C. § 12117(a)) (ADA adopts the
26 procedure set forth in § 2000e-5); NRS § 613.430 (same 90-day limitations period under
27 Nevada law after receipt of EEOC right to sue notice).

1 Plaintiff's right to sue notice indicates that the EEOC issued it on August 26, 2022
2 and clearly states that "[Plaintiff's] lawsuit must be filed WITHIN 90 DAYS of [his] receipt
3 of this notice." (ECF No. 6 at 2.) The date of receipt is unknown, and therefore, the Court
4 applies the presumption that Plaintiff received the right to sue notice within three days
5 after its issuance. See *Payan*, 495 F.3d at 1125 ("Based on the Supreme Court's use of
6 the three-day presumption in *Baldwin*, its adoption by an overwhelming number of circuits,
7 and its basis in Federal Rule of Civil Procedure 6(e), we adopt the three-day presumption
8 as the governing standard for this circuit."). This presumes that Plaintiff received the
9 notice by August 29, 2022 and was required to file his Complaint within the following 90
10 days—by November 27, 2022. However, according to the Court's docket, Plaintiff did not
11 file his Complaint until December 13, 2022—16 days late. (ECF No. 1 (indicating file date
12 of December 13, 2022).) See also LR IC 3-1(b) ("An electronic document is deemed filed
13 as of the date and time stated on the 'Notice of Electronic Filing.' The Notice of Electronic
14 Filing is emailed to each filer and the date of filing is shown on the docket."). Accordingly,
15 because Plaintiff failed to file his Complaint within the 90-day limitations period, his
16 disability discrimination and retaliation claims are time-barred unless equitable tolling
17 applies.

18 "Generally, a litigant seeking equitable tolling bears the burden of establishing two
19 elements: (1) that he has been pursuing his rights diligently, and (2) that some
20 extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418
21 (2005) (citing *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 (1990)). Plaintiff argues
22 that equitable tolling applies because the error Plaintiff's counsel encountered with the
23 CM/ECF system on November 25, 2022 "accounts for excusable delay." (ECF No. 14 at
24 8.) A declaration by Plaintiff's counsel explains that on November 25, 2022, he attempted
25 to electronically file the Complaint, but it was "never properly docketed into Pacer/ECF,
26 while not providing [him] with any type of error message." (ECF No. 14-2 at 3.) Plaintiff
27 did however successfully pay the filing fee on November 25, 2022 and submits the
28 payment receipt as proof. (ECF No. 14-3.) Plaintiff's counsel's declaration further explains

1 that he realized the Complaint was not filed on or about December 13, 2022 when he
2 attempted to file a summons, at which point he contacted the Clerk's Office about the
3 issue. (ECF No. 14-2 at 3.) The Clerk's Office assisted Plaintiff's counsel in successfully
4 filing the Complaint on December 13, 2022. (ECF No. 14 at 6.)

5 Plaintiff contends that "[t]he simple fact is the Complaint was filed on November
6 25, 2022 because Plaintiff's counsel's credit card was charged the filing fee for the
7 Complaint on November 25, 2022." (*Id.* at 8.) But paying the filing fee and filing the
8 Complaint are two separate albeit related matters, and initiating a lawsuit certainly
9 requires filing a complaint. Federal Rule of Civil Procedure 3 expressly states, "A civil
10 action is commenced by filing a complaint with the court." Plaintiff's counsel is charged
11 with knowledge of the relevant law, including the Local Rules ("LR") of this Court. LR IC
12 3-1(b) clearly states: "An electronic document is deemed filed as of the date and time
13 stated on the 'Notice of Electronic Filing.' The Notice of Electronic Filing is emailed to
14 each filer and the date of filing is shown on the docket." And LR IC 2-1(j) makes clear that
15 "[e]ach filer is responsible to monitor his or her email to ensure timely receipt of
16 electronically filed and served documents."

17 Plaintiff's counsel is a registered e-filer with the Court, as required by LR IC 2-1(a),
18 and his email address is clearly noted on the docket. See LR IC 2-1(a) ("Attorneys who
19 are admitted to the bar of this court . . . must register as a "filer" to file documents
20 electronically and must file all documents electronically as set forth in these rules.").
21 Therefore, if he or another party on his behalf had successfully electronically filed the
22 Complaint on November 25, 2022, he would have received an email confirmation in the
23 form of a Notice of Electronic Filing. See LR IC 3-1(b). The lack of an email confirmation
24 after Plaintiff's counsel's failed attempt should have immediately alerted him to the issue.²
25 Yet he offers no explanation for failing to try filing again or to contact the Clerk's Office

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27 ²According to the Court's CM/ECF records, Plaintiff's counsel has participated in
28 at least 46 cases in this district since 2015, so he should in fact be familiar with the Court's
electronic filing system and Local Rules. Moreover, Plaintiff's counsel himself concedes
that he "is familiar with the [C]ourt's electronic filing system." (ECF No. 14 at 8.)

1 that same day or shortly thereafter when he knew or should have known that the 90-day
 2 limitations period would expire on November 27, 2022. Plaintiff's counsel did not take any
 3 action to address the issue until he contacted the Clerk's Office on or about December
 4 13, 2022—18 days later. (ECF No. 14-2 at 3.) Plaintiff's counsel's delay demonstrates a
 5 lack of due diligence, and under such circumstances, the doctrine of equitable tolling does
 6 not apply.³ See *Holland v. Fla.*, 560 U.S. 631, 651-52 (2010) (“‘[A] garden variety claim
 7 of excusable neglect,’ such as a simple ‘miscalculation’ that leads a lawyer to miss a filing
 8 deadline does not warrant equitable tolling.”) (internal citations omitted); *Baldwin Cnty.*
 9 *Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984) (“One who fails to act diligently cannot
 10 invoke equitable principles to excuse that lack of diligence.”).

11 The Court therefore finds that Plaintiff's disability discrimination and retaliation
 12 claims under the ADA and Nevada law are time-barred. Because amendment would
 13 plainly be futile, the Court dismisses these claims with prejudice. See *Chappel v. Lab'y*
 14 *Corp. of Am.*, 232 F.3d 719, 725-26 (9th Cir. 2000) (“A district court acts within its
 15 discretion to deny leave to amend when amendment would be futile . . .”).

16 **B. Negligent Hiring, Training, and Supervision Claim**

17 Having dismissed Plaintiff's disability discrimination and retaliation claims under
 18 the ADA, the Court no longer has original jurisdiction over any claim and declines to
 19 exercise supplemental jurisdiction over Plaintiff's remaining state-law negligent hiring,
 20 training, and supervision claim. See 28 U.S.C. § 1367(c)(3) (“The district courts may
 21 decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has
 22 dismissed all claims over which it has original jurisdiction.”).

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 26 ³Moreover, the purported technical issue with CM/ECF does not constitute an
 27 “extraordinary circumstance” that made it “impossible” for Plaintiff to file the Complaint on
 28 time, as due diligence in inquiring into and addressing the issue would have quickly
 resolved it. See *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999) (explaining that
 equitable tolling is warranted “when extraordinary circumstances beyond the plaintiff's
 control made it impossible to file a claim on time”).

IV. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the motion before the Court.

It is therefore ordered that Defendant Rookies Inc.'s motion to dismiss (ECF No. 13) is granted in part and denied in part. The Court dismisses with prejudice and grants the motion as to Plaintiff's disability discrimination and retaliation claims. The Court declines to exercise supplemental jurisdiction over and denies the motion as to Plaintiff's state-law negligent hiring, training, and supervision claim.

The Clerk of Court is directed to enter judgment accordingly and close this case.

DATED THIS 10th Day of April 2023.

A handwritten signature in blue ink, appearing to read 'Miranda M. Du', is written over a horizontal line.

MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE